DANAHARTA URUS SDN BHD

v.

SAFRI NAWAWI & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
KANG HWEE GEE J
[CIVIL SUIT NO: D8-22-1137-2004]
3 SEPTEMBER 2008

CIVIL PROCEDURE: *Summary judgment - Guarantee - Loan sum - Whether sum owed by guarantors clearly specified - Acquisition of borrower company by Danaharta Urus Sdn Bhd - Whether sum claimed included amounts incurred after debt purchased - Whether detailed account and explanation should be given in full trial - Whether claim triable in view of s. 55 Pengurusan Danaharta Nasional Berhad Act 1998*

The plaintiff claimed against the defendants in respect of joint and several guarantees which the defendants gave to the plaintiff to guarantee a loan taken by a company called Safire Pharmaceuticals (M) Sdn Bhd ('Safire'). Safire was the 3rd defendant in the counterclaims by both the 1st and 2nd defendants herein. Originally, the loan was granted to Safire by Bank Bumiputra Malaysia Bhd ('Bank Bumiputra'). Subsequently, it was purchased by the plaintiff under s. 13 of the Pengurusan Danaharta Nasional Berhad Act 1998 ('the Act'). The plaintiff's application for summary judgment was allowed by the Senior Assistant Registrar ('SAR'). The 1st and 2nd defendants now appealed against the decision of the SAR.

Held (allowing the appeal):

(1) The crucial paragraphs of the plaintiff's affidavit did not clearly specify how the sum owed by the defendants as guarantors came to be computed. In order to compute how much was actually owed, one had to work through the workout proposal to determine the sums owed. Generally leave to defend should be given where there was reasonable ground for an enquiry or an account in order to ascertain the amount recoverable. It was not open to the plaintiff to merely mention that such and such an amount was owed to the plaintiff in a bare statement with reference to an account exhibited in the application. The court should not be expected to go through that account to determine whether indeed such sums were accurately owed. (para 12)

(2) The plaintiff could not rely on the finality certification cl. 2(p) of the guarantee as it was meant to apply between the guarantors and the original lender Bank Bumiputra. Given the interference by the plaintiff, albeit legally under the Act, the amount certified would have to include amounts incurred after the debt was purchased by the plaintiff which was not within the contemplation of the parties when they signed the letters of guarantee and indemnity. (para 12)

(3) Triable issues, notwithstanding, a defendant should nevertheless have leave to defend if he satisfies the court under O. 14 r. 3(1) Rules of the High Court 1980 that "there ought for some other reason to be a trial of the claim or part of the claim". In the present case, there was some other reason why there ought to be a trial. The defendants' liability arose purely from the joint and several guarantees of loans given to Bank Bumiputra which were subsequently acquired by the plaintiff and thereafter managed by the appointed special administrators. The statutory acquisition and the appointment of the special administrators were certainly not in their minds and not what they had bargained for under the joint and several guarantees that they had signed. (para 12)

(4) Section 55 of the Act did not exempt the plaintiff from justifying the transactions that it had undertaken after its acquisition to provide a complete and detailed account of how the sum claimed for was arrived at. The acquisition by the plaintiff of the assets of Safire and the appointment of the special administrators to administer its assets have rendered the co-extensive liability of the defendants so much more technical and complicated. They could not be explained and understood by the brief statement of account given. The defendant guarantors were entitled to a detailed account and explanation of how the sum claimed for was arrived at. That could only be done in a full trial. (para 12)

Case(s) referred to:

Bank Bumiputra Malaysia Bhd Kuala Terengganu v. Mae Perkayuan Sdn Bhd & Ors [1993] 2 CLJ 495 SC ***(refd)***

Chen Heng Ping & Ors v. Indradagang Merchant Bankers (M) Bhd [1995] 3 CLJ 690 CA ***(refd)***

Citibank NA v. Ooi Boon Leong & Ors [1981] 1 MLJ 282 ***(refd)***

Contract Discount Corp Ltd v. Furlong [1948] 1 All ER 274 ***(refd)***

Gold Ores Reduction Co v. Pain [1892] 2 QB 14 ***(refd)***

National Company for Foreign Trade v. Kayu Raya Sdn Bhd [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283 FC ***(refd)***

Standard Chartered Bank Ltd v. Walker and Another [1982] 3 All ER 938 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 87
Pengurusan Danaharta Nasional Berhad Act 1998, ss. 13, 32, 55
Rules of the High Court 1980, O. 14 rr. 2, 3(1)

Other source(s) referred to:
Bonham-Carter v. Hyde Park Hotel, Limited, The Times Law Reports Friday 16 April 1948, 177

For the plaintiff - Adrian Hii; M/s Shook Lin Bok
For the 1st defendant - R Jegatheesa; M/s RJ Esa & Co
For the 2nd defendant - Pushpam Subramaniam; M/s Pushpam & Co

Reported by Usha Thiagarajah

JUDGMENT

Kang Hwee Gee J:

[1] Enclosure 245 is an appeal by the 1st defendant against the decision of the senior assistant registrar in allowing the plaintiff's application for summary judgment against the 1st defendant.

[2] Enclosure 246 is an appeal by the 2nd defendant against the decision of the senior assistant registrar in allowing the plaintiff's application for summary judgment against the 2nd defendant.

[3] The plaintiff's claim against the defendants is in respect of a joint and several guarantees which they gave to the plaintiff to guarantee the loan taken by Safire Pharmaceuticals (M) Sdn Bhd the 3rd defendant in the counterclaim.

[4] Originally the loan was granted by Bank Bumiputra Malaysia Berhad to the borrower. Subsequently it was purchased by Danaharta Urus Sdn Bhd under s. 13 of the Danaharta Act 1998 including the present guarantee now in contention.

[5] The relevant provisions in the joint and several guarantees which bind the guarantors and relied upon by the plaintiff in the O. 14 application for summary judgment before the registrar reads as follows:

> 1.1 The Guarantor/Guarantors hereby unconditionally and irrevocably guarantee as principal debtor(s), jointly and severally, and not merely as surety(ies) to pay and satisfy the Bank on demand:
>
> (a) in full all monies which are owing and payable by the Borrower(s) to the Bank under the Loan Agreement or such

A amount thereof as may be outstanding, whether certain or contingent now or hereafter owing as incurred to the Bank from or by the Borrower including all the interest, costs and charges described hereunder (hereinafter collectively referred to as "the Indebtedness");

B 2.(p) Conclusive Evidence

That a written statement from the Bank as to the amount due and owing by the Borrower shall be accepted by the Guarantor/ Guarantors as conclusive evidence that the amount thereby appearing is due from the Borrower(s) to the Bank and payable C on demand to the Bank by the Guarantor/Guarantors;

[6] Mr R Jegatheesa For The 1st Defendant: (Verbatim)

i. The statement of claim of the plaintiff does not disclose the cause of action. What the plaintiff is actually saying is "I suffered so much D loss" and throws it to the court to award damages without any evidence of the loss. See *Bonham-Carter v. Hyde Park Hotel, Limited*, The Times Law Reports Friday April 16 1948 177.

ii. Also which particular provision of the guarantee, the 1st and 2nd defendants are in breach of is not set out in the statement of claim. E

iii. There was no demand for the payment of the guarantee in this case. We required the notice of the demand, this being on demand guarantee.

F iv. Clause 1.1(a) of the joint and several guarantees – "owing as incurred to the bank from or by the borrower" requires the plaintiff to show the statement of account at least to prove that such and such an amount was owed. This was not done. We have asked of it many times. The conclusive evidence clause is defective as it says it must be from a bank officer but in this case by Danaharta a G statutory body. See encl. 7 exhs. "DUSB-7" and "DUSB-8". The certificate is undated although it states the amount due as at 30 April 2004. The statement of account provided by the plaintiff is inadequate. It does not show purchase by Danaharta. It does not show how much Dr. Hamimah the 2nd defendant had paid but is H not reflected in the account.

v. The business of Safire was destroyed by the plaintiff in taking over the shares of the defendants at a minimal value. They also sold the business of the company to a competitor Pharmaniaga I Pharmaceutical Berhad at a sum of RM20 million. There is a duty of care expected of a special administrator under Section 32. He is an agent of the affected person Safire in this case. In this case he was to look after Safire. The special administrators did not consider

the fact that there were guarantors and that they owe a duty to them. There was a disposal of assets of Safire and they would be in the same position of the company. See *Standard Chartered Bank Ltd v. Walker and Another* [1982] 3 All ER 938.

vi. The plaintiff is not in a position to return the securities to Safire even if payment is made under the guarantee and indemnity.

vii. The Danaharta Act came into force after the guarantees were executed and the guarantors are not protected. Pharmaniaga bought over Safire because Safire was like a jewel sought after by many competitors in the pharmaceutical industry because Safire was under an adoption scheme. This adoption scheme means Safire was under the Ministry of Finance through the Ministry of Health.

viii. There is a substantial variation between the original arrangement with respect to the guarantee and indemnity and the subsequent arrangement between the plaintiff and the defendants. The accounts were not given. The amount of the purchase price has not been given to us.

ix. Safire was an ongoing company and there was no reason to come into the company and take over in the manner which the plaintiff did.

x. Before this takeover there were serious discussions between the major shareholders of Safire and the plaintiff all of which are reflected in the affidavit evidence. The major shareholder of Safire is PKNP, investment arm of SEDC, and they have not been brought in as a party.

[7] Miss Pushpam For The 2nd Defendant: (Verbatim)

i. The statement of claim by para. 4 it is clear that is not only as guarantors and indemnors but also as principal debtors. If they are principal debtors, statement of accounts must be furnished, and also the purchase price of Safire by the plaintiff from Bank Bumiputra Malaysia Bhd, the original bank that granted the loan amount. The certificate of indebtedness which had been presented with respect to the O. 14 is defective on the face of it.

ii. In so far as they are treated as principal debtors then it is incumbent for the plaintiff to have realized that one of the reasons that the plaintiff appointed special administrators under s. 25, more particularly (b) that the survival of the primary affected person and the whole or any part of its assets as a going concern may be achieved; and (c) a more advantageous realization of the primary affected person's assets may be achieved than on a winding up.

The special administrators did not carry out their duties as agents for their guarantors because they are in breach of their trust.

iii. The purchase of the shares pursuant to the workout proposal was RM20 million. Paragraph 15 of the statement of claim states that they had only collected RM17,226,618.74 pursuant to the workout proposal and they say the proposal was implemented on 15 September 2003. See Subscription Agreement Tab 11 of Chronology of Events para. 5 – consideration and payment. Danaharta should have collected all the monies at the specified time. The 3rd sum of RM18 million must be paid over by them. It has a right to terminate the sale by tender, if they did not terminate. My client the 2nd defendant paid on 26 June 2003 a redemption figure amounting to RM29 million to Danaharta, the plaintiff.

iv. The statement of claim is defective on the face of it and the plaintiff cannot seek to use intrinsic evidence either by way of affidavit and or otherwise. Therefore why did the plaintiff not accept the sum of RM26 million as offered by my client the 2nd defendant on behalf of Safire to redeem the said company Danaharta. See letter from the plaintiff to the 2nd defendant on 8 July 2003. This letter did not state that the RM29 million has already been given to the plaintiff in the form of bank draft. However, all it states is they are looking at her proposal and that they will revert to her later at the date when the monies were given. It was good money and good tender and Danaharta has a duty to accept this money because the tender exercise was more than six months. The subscription agreement states it was valid for six months unless a further extension is given.

v. I also cross reference to the subscription agreement at 5.2 together with the statement of claim which indicates our point that the plaintiff could have terminated the tender exercise and could have allow her to redeem Safire.

vi. It is our contention that the plaintiff wanted to hand over Safire to Pharmaniaga in order to achieve the target that Pharmaniaga should hold both the adoption scheme bumiputra companies ie, Safire the 2nd defendant company and remedy which Pharmaniaga already held.

vii. Danaharta in the appointment of their officers can be sued and that is why we filed our counterclaim.

[8] Encik Adrian Hii For The Plaintiff: (Verbatim)

i. The judgment that we obtained is for the sum of RM34,637,871.26. This is derived from the debt of Safire to Bank Bumiputra in the sum of RM51,864,490. Against this sum is to be deducted the sum of RM17,226,618.74. This is the sum that was realized by the special administrators from the sale of the shares of the borrower pursuant to the special administrators exercising their power under the Danaharta Act. The plaintiff has waived any interest accrued and had restricted this claim to the sum of RM34,637,871.26 with interest at 8% per annum from an arbitrary date fixed at twenty days after we received the RM17,226,618.74.

ii. Untrue that statement of claim does not plead the cause of action. All the material facts have been pleaded in the form required by the Rules of the High Court 1980 that is to say that the contract of guarantee, that the borrower had failed to make payment that demand was issued to the guarantors and the guarantors had failed to pay.

iii. There was a demand to the guarantors and this is in encl. 7 exh. "DUSB6" p. 321.

iv. Enclosure 7 p. 145 cl. 12.1 of the loan agreement provides that in the event of default the bank shall have the right to exercise the powers under the security documents including pursuing all remedies under the security documents. In the event of default under cl. 12.1 the repayment of sum becomes immediately due.

v. Certificate of Indebtedness as well as the statement of account show that the debt that is originally outstanding is RM51,864,490 which was the amount acquired from Bank Bumiputra and this sum is verified in the workout proposal that was prepared by the special administrators. The statement of account also reflects all the payments RM17,226,618.74 received by the plaintiff from the special administrators. Evidence of the payment of RM17,226,618.74 is produced in the affidavit. The certificate of indebtedness is binding as there is no manifest error. See *Citibank N.A. v. Ooi Boon Leong & Ors* [1981] 1 MLJ 282 and another case *Chen Heng Ping & Ors v. Indradagang Merchant Bankers (M) Bhd* [1995] 3 CLJ 690. (Onus on the defendants to show manifestos.)

vi. There is no conspiracy to sell the assets under value. The special administrators were appointed and they prepared a Workout Proposal for the sale of the assets of the borrower by way of the sale of its shares in order to realize the assets and pay off the creditors. The

A sale of the shares was by way of public tender exercise which was advertised nationally. In the end only one bid was received from Pharmaniaga Bhd. See advertisement exh. "SN15" encl. 47 for advertisement in the New Straits Times.

B vii. The fact that the Danaharta Act came into force after the security is effected should not affect the position of the defendants who are still bound by its provision.

viii. The defendants are not discharged by the variations of the terms of the loan *vis-a-vis* the borrower on account of cl. 2(c) and 2(aa) of
C the guarantee which provides that the Bank may without discharging the guarantors' liability, vary, add to or alter the provision of the loan agreement.

ix. The financial statement in the Workout Proposal in encl. 7 p. 230 clearly shows that the borrower was insolvent at that time for
D example as at year ended 1999 the liability exceeded the assets by RM15 million.

x. Regarding the proposal made by the shareholder PKNP to restructure the loan there were various proposals made. The debt
E was about RM50 million and the plaintiff was prepared to accept about RM30 million but PKNP a shareholder was prepared to pay about RM25 million and therefore there was no settlement.

xi. With regard to the contention that the defendants are principal debtors they are only deemed to be principal debtors for liability but
F they are not in status a principal debtor which is the borrower. Therefore there is no basis to the contention that the statement of account should be furnished to the defendants. There is no merit to the contention that the plaintiff must disclose the price at which it purchased the non-performing loan from Bank Bumiputra. The price
G is irrelevant to this action.

xii. With regard to the contention that the borrower is a viable entity and should not have been acquired there is no merit in this because the borrower remains insolvent as shown by its financial statement
H and was unable to pay its debt.

xiii. The contention that only RM17,226,618.74 was paid by Pharmaniaga is incorrect. The purchase price at which Pharmaniaga agreed to pay to subscribe to the shares of the borrower was RM20 million which was to be paid to the special administrators.
I This sum has been paid to the special administrators but out of this sum a certain amount would have been paid to the essential

creditors which are defined in the Workout Proposal who are entitled to priority in payment before payment to the plaintiff as secured creditor. There is no basis to the contention that the shares subscription agreement should have been terminated by the special administrators for failure of purchaser Pharmaniaga to pay the full purchase price.

xiv. With regard to the RM29 million cheque that was paid by the 2nd defendant this was received on 26 June 2003 and paid to the plaintiff. The plaintiff issued a letter dated 8 July 2003 to the 2nd defendant saying that her proposal was under evaluation. On 10 July 2003 Pharmaniaga had informed the special administrators that there were ten promissory notes issued purportedly by Safire and guaranteed by Pharmaniaga Logistics Sdn Bhd. which were in relation to the cheque issued by the 2nd defendant. The special administrators confirmed that they have not authorised the promissory notes and they lodged a police report. On 16 July 2003 the police took the bankers cheque that was issued by the 2nd defendant and has charged the 2nd defendant for money laundering. The proposal could not have been accepted in any case because on 24 May 2002 the special administrators have accepted the bid from Pharmaniaga Bhd at RM20 million and the share subscription agreement was on 4 September 2002.

xv. The plaintiff had purchased from Bank Bumiputra the following items as described from (a) to (j) in the schedule to the vesting certificate in encl. 7 exh. "DUSB3" acting under s. 13 read with 14. Under s. 25 the power to appoint special administrators to administer the borrower if the corporation is satisfied:

(a) that the primary affected person:

(i) is unable or likely to be unable to pay its debts; or

(ii) is unable or likely to be unable to fulfil its obligations to its creditors.

(b) the survival of the primary affected person and the whole or any part of its assets as a going concern may be achieved;

(c) a more advantageous realization of the primary affected person's assets may be achieved more than on a winding up; or

(d) the appointment may achieve a more advantageous realization or a more expeditious settlement of a duty or liability owed by any person to the Corporation or any subsidiary of the Corporation, whether future, present, vested or contingent.

xvi. There is a counterclaim by the defendants against the plaintiff and the fact that there is one does not preclude the plaintiff from obtaining judgment on its claim without affecting the right of the defendants to pursue their counterclaim separately. See *Bank Bumiputra Malaysia Bhd Kuala Terengganu v. Mae Perkayuan Sdn Bhd & Ors* [1993] 3 CLJ 495 per Abdul Hamid Omar LP at p. 505:

> The dismissal of the bank's counterclaim in respect of the sum owing by the first respondent to the bank on the overdraft facility on the ground that the bank was in breach of contract in recalling the overdraft prematurely cannot be justified. The bank's claim for recovery of the loan was an entirely separate matter from the first respondent's claim for damages against the bank. There is no ground in law for exempting the first respondent from liability to repay the loan.

[9] Reply By Encik R. Jegatheesa: (Verbatim)

1. There are basic differences between *Mae Perkayuan* case, *supra*, and our case. In our case, we say:

(i) There was no recall or demand of the loan upon the purported default by the plaintiff in this case.

(ii) The amount purportedly paid to purchase the loan or guarantees from the bank has not been disclosed by the plaintiff. In fact the plaintiff has acted with a lot of stealth and secrecy. It is only during the course of this proceeding that we came across the so called Workout Proposal and the subscription agreement.

(iii) In the *Mae* case there was a full trial and decision was made after the hearing of the parties.

(iv) The plaintiff has acted in bad faith from the date of acquisition that is May 1999 when the vesting order was put there. They transferred the facilities under the agreement. The facilities are securities for redemption.

(v) The plaintiff would be unable to return the securities which they took including Safire which was the jewel of the pharmaceutical industry.

(vi) Exhibits "DUSB7" and "DUSB8" of encl. 7 – in the *Mae* case there was no dispute of the amount. In our case a manifest error in the face of our record and it cannot be corrected by affidavit evidence if we used the conclusive evidence clause. The plaintiff seems to have selected the time

period in the statement of account. It is a selective time period not the time period from the period of acquisition in May 1999 until the proceeding were filed. "DUSB7" and "DUSB8" must be read together because "DUSB8" contains the amount that is stated in "DUSB7". Again I must point out that the purchase by the "DUSB" is not reflected in the statement. There must be transparency.

(vii) The plaintiff has given a release to Safire by selling the shares and business of Safire to Pharmaniaga. Therefore the plaintiff cannot reserve its right against the guarantors. See *Webb v. Hewitt* 3 K & J 438, 1181. The creditor gives a release in this case. He cannot reserve the right against the guarantors because the depth is gone in law. That's what *Webb* case demonstrates as far as the guarantors are not affected persons under the Act. But see s. 87 of the Contracts Act 1950. As Safire is released the guarantors are released also.

(viii) Unlike the *Mae* case the borrower Safire is not a party in our case. In the *Mae* case the borrower was a party.

(ix) The Safire at all material times an ongoing company. The onus is on the plaintiff to prove otherwise.

(x) There was a series of correspondence and discussion between the bank and the plaintiff before the vesting. Although the plaintiff acknowledges the strength the plaintiff says we are not entitled to these documents. Just like they say about their account.

(xi) The discussion between PKNP and the plaintiff. Reference may be made to exhs. "SN2" to "SN10" of encl. 47. The essence of the series of correspondence between PKNP and the plaintiff is set out in these documents and the last offer that was made by PKNP was something like RM22.06 million. At the same time there was another valuation report done by Ernest and Young for RM15 million. This was not disclosed by the plaintiff yesterday. And if RM15 million was offered there would be no necessity to proceed with the purported auction. In fact in "SN10" PKNP has offered the redemption sum of RM26,432,988.94 but this was refused as the plaintiff was more interested in selling the shares of Safire.

(xii) The Consultancy Services Agreement is exh. "SN17". It is made between the plaintiff's principal and a consultancy firm KPMG. This consultancy firm entered into an agreement with the plaintiff's principal prior to the vesting order. The special administrators were appointed from KPMG under this agreement and not under the Act as alleged. There was misconduct in this letter because the sale of the product of Safire was sufficient to pay off what debts were due if any. But the special administrators did not take the initiative to attend to this even though they were agents of the guarantors.

(xiii) The purpose of Workout Proposal is to set forth the special administrators' plan with respect to the affected person. In this case the modified Workout Proposal is dated 25 October 2002 although the special administrators were appointed on 8 November 2001 under the Consultancy Services Agreement. The Workout Proposal is not as was envisaged by the Act. What was made available in the course of proceeding is a worked out proposal. Another way of putting it is it was already decided what should be done. So the Safire was not even consulted and it went on according to schedule and cronies.

(xiv) The subscription agreement was dated 4 September 2002. The so called workout proposal is dated 25 October 2002. In other words we can see from the date the Workout Proposal was after the subscription agreement. So it could not have been in the plan of action. A peculiarity in the Workout Proposal is that the parties have prepared the documents and are undenially KPMG which I mentioned earlier and they have sought power under the disclaimer clause, see p. 250 of encl. 7.

(xv) Capital Reduction – 50 shares were transferred to Pharmaniaga for RM50. This is grossly under valued for what it is worth. The guarantors and PKNP refused to accept. See exh. "SN16" of encl. 47. The previous shareholders returned the documents to the plaintiff.

(xvi) Plaintiff has not stated its claim accurately or clearly and that is one of the requirements in the case quoted by my learned friend at p. 4 of the Bundle of Authorities in *Gold Ores Reduction Co. v. Pain* [1892] 2 QB 14 quoted in the *National Company for Foreign Trade v. Kayu Raya Sdn Bhd* [1984] 2 MLJ 300 for the purpose of the O. 14 application

the statement of case must be complete and good in itself; any defect or omission cannot be corrected or supplemented by the plaintiff's affidavit.

(xvii) There are triable issues for consideration of this Honourable Court. What constitutes some other reasons depend on the facts and certain circumstances on this particular case. See O. 14 r. 3 of the Rules of the High Court 1980.

(xviii) My final contention is that I have demonstrated the plaintiff has not even satisfied the preliminary requirements under r. 2 of O. 14 of the Rules of the High Court 1980 and therefore has failed to establish a *prima facie* case. It is inappropriate to disallow our appeal as there are triable issues intertwined with the counterclaim. The suit must be set out for trial in the interest of justice.

[10] Reply by Miss Pushpam for the 2nd defendant: (verbatim)

i. The plaintiff has failed to show in the statement of claim that the exact amount which ought to have been claimed is RM51.86 million. In the statement of claim the plaintiff has alleged that they have only collected RM17,226,618.74. In the submission it has been submitted that there is a further RM9 million which should have been paid by the tenderer. No accounts have been furnished to indicate as to what happened to this RM9 million, by their own admission.

ii. In the premises the shortfalls appeared to be a sum of RM2,773,311.83 plus a further sum of RM9 million as per the admission. Therefore the total purchase price appears to be RM29 million as has been admitted.

iii. The claim as indicated in the statement of claim is RM51.86 million.

iv. The certificate of indebtedness as exhibited in "DUSB8" is a sum of RM34,637,871.26 as at 30 April 2004. Should the figure as claimed in the statement of claim be deducted there is a shortfall of RM4,490 on the fact of the certificate. There is a manifest error.

v. If this is correct, from the sum of RM34,637,871.26 a further sum of RM9 million is deducted the figures should leave a balance of RM25,637,470.26.

vi. Our contention is that the certificate of indebtedness itself is not accurate in the first place by an increase sum of RM4,490 and secondly it lacks to show what happened to the RM9 million which was due to collect from the purchaser to the tenderer of the said

company. This manifest error cannot be rectified by any other documents because the certificate of indebtedness is the one document that can clearly show the liability of the defendants.

[11] Reply By Mr Adrian Hii For The Plaintiff

i. The sum of RM17,226,618.74 was the net sum after the special administrators had paid the essential creditors who are entitled to priority of payment under the terms of the Workout Proposal. The further sum of RM9 million is not sum due from Pharmaniaga the purchaser of the shares but from pre-existing creditors of the borrower. Under the terms of the Workout Proposal, Pharmaniaga is to collect those debts from the creditors on behalf of the borrower. See encl. 7 p. 235 of the exh. "DUSB4" that is the Workout Proposal. The special administrators paid the net sum of RM17,226,618.74 to the plaintiff and accordingly there is a shortfall of RM34,637,871.26. As far as the plaintiff is concerned, it has taken into account the sum that it has received from the special administrators.

Findings And Decision

[12] Having heard the submission of the parties and considered the facts of the case as per pleading it is clear to me that summary judgment ought not to have been entered for the following reasons:

1. The crucial paragraphs of the plaintiff's affidavit which attempt to show that its claim is clear and therefore need not go for trial are set out in paras. 12 and 16 which read:

> 12. Pursuant to their powers under the Danaharta Act, the Special Administrators prepared a Modified Workout Proposal dated 12.8.2003 ("the Workout Proposal"), which was duly approved by Pengurusan Danaharta Nasional Berhad and the Plaintiff, as secured creditor of the Borrower. The debts of the Borrower were to be resolved as set out therein. A copy of the Workout Proposal dated 12.8.2003, is produced and shown to me marked as Exhibit "DUSB-4".
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> 16. The Workout Proposal has been implemented on 15.9.2003 and the Special Administrators were discharged on 8.10.2003. The Plaintiff has since only received RM17,226,618.74 pursuant to the Workout Proposal. A copy of the letter dated 7.10.2003 discharging the Special Administrators is produced hereto and shown to me marked as Exhibit "DUSB-5".

It is clear that the two paragraphs did not specify clearly how the sum owed by the defendants as guarantors came to be computed. They merely refer to a statement of account and Workout Proposal. In order to compute how much is actually owed, one has to work through the Workout Proposal to determine the sums owed. Generally leave to defend should be given where there is reasonable ground for an enquiry or account in order to ascertain the amount recoverable. See *Contract Discount Corp. Ltd. v. Furlong* [1948] 1 All ER 274 as cited in The Supreme Court Practice (UK) 1997 at p. 162. It is not open to the plaintiff merely to mention that such and such an amount was owed to the plaintiff in a bare statement with reference to an account exhibited in the application and expect the court to go through that account to determine whether indeed such sums were accurately owed.

2. The plaintiff cannot rely on the finality certification cl. 2(p) of the guarantee as they were meant to apply between the guarantors and the original lender Bank Bumiputra. Given the interference by Danaharta (*albeit* legally under the Act) the amount certified would have to include amounts incurred after the debt was purchased by Danaharta which was not within the contemplation of the parties when they signed the letters of guarantee and indemnity.

3. Triable issues notwithstanding, a defendant should nevertheless have leave to defend if he satisfies the court under O. 14 r. 3(1) that "there ought for some other reason to be a trial of the claim or part of the claim".

Circumstances which might afford "some other reason for trial" includes cases:

> where the claim is of a highly complicated or technical nature which could only be properly understood if such evidence is given, or if the plaintiff's case tended to show that he had acted harshly and unconscionably and it is thought desirable that if he were to get judgment at all it should be in the full light of publicity" per Cairns L.J. in *Bank fer Gemeinwirtschaft Aktiengesellschaft v. City of London Garages* [1971] 1 W.L.R. 149 at 158 as cited in the 1997 Supreme Court Practice (White Book).

There is "some other reason" why there ought to be a trial in the instant case. The defendants' liability, it must be noted, arose purely from the joint and several guarantees of loans given to Bank Bumiputera which were subsequently 'acquired' by Danaharta and thereafter managed by the appointed Special Administrators. The statutory acquisition and the appointment of the Special Administrators were certainly not in their minds and not what they

had bargained for under the joint and several guarantees that they had signed. It is true that for the purpose of this application for summary judgment the plaintiff may be able to say that its claim is non triable by relying on s. 55 of the Act which provides that "any payment made, transaction entered into, or any other act or thing done in good faith by or with the consent of the Special Administrators is valid and effective for the purpose of this Act and shall not be void or voidable, nor be considered as an undue preference in the winding up of the affected person". But s. 55 does not exempt the plaintiff from justifying the transactions that it had undertaken after its acquisition to provide a complete and detailed account of how the sum of RM34,637,871.26 was arrived at. The acquisition by the plaintiff of the assets of Safire and the appointment of the Special Administrators to administer its assets have rendered the co-extensive liability of the defendants so much more technical and complicated.

They cannot be explained and understood merely by the brief statement of account (exh. "DUSB7") wherein without more only the opening balance, the repayments and the closing balance are stated.

The defendant guarantors are entitled to a detailed account and explanation of how the sum claimed is arrived at which can only be done in a full trial.

[13] The appeal is allowed with costs.